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THE ORIGIN OF ASSUMPSIT.

NOTHING more strikingly shows how procedural difficulties may obstruct legal development than the classic above which Mr. Ames has written the title "The History of Assumpsit."¹ The reader of that essay will recall the tugging, twisting, and straining to which the common law was subjected before the action of assumpsit became a member of the common-law family. It is our purpose to end where "The History of Assumpsit" begins, and to glance for a moment at the origin of assumpsit. The first actions of assumpsit were in semblance delictual actions, inasmuch as the remedy was pursued under the guise of a trespass on the case. The defendant who had made a promise and failed to keep it was conceived to have wronged the plaintiff, who declared accordingly in trespass on "his" case.²

It must be observed that the action of trespass on the case itself was of no great antiquity when the lawyers set to work to fashion from it the action of assumpsit. It was born in 1285, when the Statute of Westminster II provided:

"whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none, the clerks in Chancery shall agree in making the writ."

The wording of the statute itself indicates the condition for which a remedy was sought. The different forms of action in existence at that time may have numbered some few hundreds, many providing exactly the same relief under different circumstances. For example, there had been very early in the law one action for injuries due to a trespass by swine, and a separate action for injuries due to a trespass by cattle. The moral is plain. The early law is on the horns of a dilemma. Its remedies become infinite in number, unless a procedure classifies all cases of like nature as having like remedies. And if the classification lack flexibility, the suitor who has not been classified is remediless. Therefore, the value of so flexible a statute

¹ 2 HARV. L. REV. 1.

² J. B. Ames, *History of Assumpsit*, 2 HARV. L. REV. 1.

as that of Westminster II to common-law jurisprudence, cannot be overestimated.

If we glance at the numberless remedies of the common law, one fact above all others is noteworthy. But a few dozen have survived. And trespass on the case, the parent, and assumpsit, the offspring, have absorbed possibly nine-tenths of the actions, each of which had its own separate procedure.

The action of trespass on the case did not attain immediately to the popularity that it now enjoys. Fitzherbert gives but fifty-two cases of "*accion sur le case*," to the end of Henry VI, which means only fifty-two reported cases between 1285 and 1471, almost two hundred years. We are interested here only in those earlier cases that arose before that doctrine of consideration from which Mr. Ames has dusted the cobwebs.

One of the earliest cases is simply a type of those cited in "The History of Assumpsit," but the argument is interesting to this discussion. It is an action against one who had undertaken to cure a horse and failed in his duty.

"A writ was brought, supposing by the writ that the defendant undertook to cure his horse of sickness, and afterward the defendant made his cure so negligently that the horse died. And the writ was challenged because it made mention of '*contra pacem*' and the opinion of the judges was that the writ was bad. The writ was produced, and there was no '*contra pacem*' in the writ, wherefore it was held good; and then it was challenged because he has counted that he had taken upon himself (to cure the) horse of his ailment &c. in which case he should have an action of covenant; and the court held the writ good. Kyrton. The defendant made his cure as well as he knew how, denying that he undertook to cure the horse of his ailment, ready &c. and he was not received to such an issue, but he was driven to say that he made his cure as well as he knew how, denying that he died for default of his cure, and they were at issue."³

Two matters are clear from this case. The court did not compel the plaintiff to sue in trespass, nor did it insist that the plaintiff take covenant for his remedy. In other words, the court enforces the undertaking. Mr. Holmes is of opinion⁴ that the case was dealt with by the court as a pure action of tort, but I cannot see that the report justifies this inference. The court holds the writ good on finding that there is no "*contra pacem*," and it refuses to consider

³ Y. B. P. 43 Edw. III, pl. 33.

⁴ The Common Law, 277.

the objection that there is a covenant. It should be remarked that the presence of the words "*contra pacem*" in a writ of trespass on the case alleging a failure to perform a duty was ground for abating the writ.⁵

That this interpretation of the case is correct is indicated by a case but sixteen years later, — an action based upon a covenant and set forth as such in the declaration.

"Action upon the case, and counted that on a certain day and year in London, a covenant was entered into between the plaintiff and the defendant, that the defendant would cure the plaintiff of a certain sickness, and he to pay him a certain sum of money, whereupon he engaged to cure him of his sickness; and the defendant should come to the Strand, and administer his medicines to him, which aggravated his sickness whereby he became worse than he was before, and would have lost his life, if he had not besought another to save him; and the writ was brought in London.

"Rikhill. Judgment of the writ, because this action is not brought upon the covenant but for the tort which is supposed to have been done in the Strand, which is in another county, wherefore the writ should be brought there.

"Thirning, Justice. He may choose, and bring the action in either county, and if he take issue upon the medicines, then summon a jury of Middlesex, and if upon his undertaking to cure, then summon a jury of London. And the writ was held good.

"Rikhill. In London, in the parish of —, we came and applied medicines to his malady, by which he was saved and cured of his sickness, and so the covenant performed.

"Thirning. The covenant in London is but the beginning of the covenant and he has said that you came to the Strand and gave to him unwholesome medicines which made him worse to which you must reply, wherefore Rikhill did so, and pleaded to this."⁶

In this case the word "assumpsit" is used ("*sur l'enprisel del cure*"), and the entire action rests upon the undertaking and the defendant's failure to fulfil his obligation. Indeed the defendant takes issue upon this matter, and denies directly the plaintiff's claim by saying "we performed the cure."

This is in the year 1377, less than one hundred years after the Statute of Westminster II. In 1370, the court countenanced an

⁵ Y. B. T. 45 Edw. III, fol. 17, pl. 6.

⁶ Y. B. P. 11 R. II, Fitzherbert, Accion sur le case, 37.

action in case, in which an assumpsit was expressly laid, a period of but eighty-five years after the statute. The subsequent career of assumpsit is simple and easy to follow, thanks to the work of Mr. Ames. It is desired here to trace the earlier processes by which the principles above discussed had been established. Once establish an assumpsit, an undertaking, a promise, as the basis of an action, and all related phenomena will, in time, be assimilated to it, as Mr. Ames has so ably demonstrated. But what prior development led to the recognition of a promise as the basis of an action? Let us note this distinction. The question is not, what led to the recognition of a promise as the basis of an action in tort, but what led to the recognition of a promise as the basis of any action.

Let us first examine the cases of trespass on the case to the end of Richard II, in order to determine, if possible, the general lines of liability imposed by that action. There are in all sixteen actions reported in Fitzherbert of "*accion sur le case*." They are as follows:

1. An action on the case for wrongfully taking toll. Clearly a trespass.⁷ (Held a trespass and the action on the case abated.)

2. An undertaking to cure a horse. An assumpsit.⁸

3. An action for damages due to failure to repair a ditch.⁹

4. An action against a smith for driving a nail into a horse's foot.¹⁰ Partly a trespass, partly an assumpsit.

5. An action for damages resulting from failure to repair a fence or hedge. In this case be it noted, by those whose law must have been proclaimed within the last few weeks, there is laid a duty, a breach of the duty, and resulting damage.¹¹

6. An undertaking to cure the plaintiff of sickness. A pure assumpsit, with no element of tort whatever.¹²

7. An action in case for continuing to hold a plea after the cause had been removed into the common bench.¹³

8. An action on the case, alleging that the defendant had undertaken to carry the plaintiff's mare, safe and sound, across the Humber, and that the defendant so overloaded the boat with other

⁷ Y. B. M. 41 Edw. III, fol. 24, pl. 17.

⁸ Y. B. M. 43 Edw. III, fol. 33, pl. 38.

⁹ Y. B. T. 45 Edw. III, fol. 17, pl. 6.

¹⁰ Y. B. T. 46 Edw. III, fol. 19, pl. 19.

¹¹ Y. B. H. 11 R. II, Fitzherbert, *Accion sur le case*, 36.

¹² Y. B. 11 R. II, Fitzherbert, *Accion sur le case*, 37.

¹³ Y. B. 14 Edw. III, Fitzherbert, *Accion sur le case*, 39.

things that the mare was drowned. It was objected that no tort was alleged, and that the remedy was in covenant. But it was held that the wrong was in overloading the boat, and the defendant pleaded not guilty.¹⁴

9. An action on the case for slander, in branding the plaintiff as a traitor and a robber, in open court.¹⁵

10. An action on the case for selling to the plaintiff eight cows and eight calves, belonging to a third person, which were afterward taken from the plaintiff to his damage.¹⁶

11. An action on the case against the lord in ancient demesne, who had refused to hold his court.¹⁷

12. An action on the case for disturbing a prior in his right to hold a fair.¹⁸

13. An action against a smith for driving a nail into the foot of plaintiff's horse.¹⁹

14. Case for neglect of duty to keep a close fenced, and resultant damage by straying cattle.²⁰

15. Case upon a customary duty on the part of a brewer to furnish a beadle with a certain quantity of beer:

"J. F. brought a writ of trespass against certain persons for this, that he is beadle of the hundred of H., and should have from the Brewer, three gallons of the best beer for seven pence, and says that himself and those whose estate he has in the said hundred have been seised of this (for such a time).

"Hankford. Judgment of the count, because he has not shown how he has his estate and afterward Hankford said: Still judgment of the count, because he wishes to have from every Brewer, Beer, by virtue of his office, and so he should have severed his action, because this is one trespass in itself and it was not allowed, because all in covenant are accessories.

"Hankford. He has shown that he was disturbed, in which case he should have the assise.

"Thirning. Peradventure he has nothing, but by reason of his office, for the time being, just as a clerk, although he has nothing but an occupa-

¹⁴ Lib. Ass. 22, pl. 41.

¹⁵ 30 Ass. 177, pl. 19.

¹⁶ Lib. Ass. 42, 259, pl. 8.

¹⁷ Y. B. M. 11 Edw. II, Fitzherbert, Accion sur le case, 46.

¹⁸ Y. B. P. 16 Edw. II, Fitzherbert, Accion sur le case, 47.

¹⁹ Y. B. 46 Edw. III, 19, Fitzherbert, Accion sur le case, 49.

²⁰ Y. B. 29 Edw. III, 32.

tion for a certain time, still if anyone does him a wrong to a thing which pertains to his Office, he shall have a writ of trespass, and so here."²¹

16. Case for disturbing a prior in the collection of his tithes.²²

These cases indicate with a fair degree of accuracy the use to which the action on the case was put in the first century of its existence. It must be observed, first of all, that the element of public wrong, of delict, has entirely disappeared. The presence in the count, in trespass on the case, of the words "*contra pacem*" invalidates the writ, as the action then should be trespass.²³

Again, we are driven to the conclusion that the statute has fulfilled the exact purpose for which it was designed; it has spread its wings and given shelter to a most miscellaneous flock of legal chicks. But, miscellaneous as the cases are, they fall into two general categories, — breaches of duty and assumpsits. If we seek predominance in any one type, that predominance will be found in assumpsit, for there are two well-defined cases of undertakings, two breaches of duty based on undertakings, and an action upon a custom. The remainder, as we have observed, are miscellaneous, the majority consisting of well-defined breaches of duty.

Now the problem to which the writers have sought a solution is this: "Assumpsit began as an action of trespass on the case, and the thing to be discovered is how trespass on the case ever became available for a mere breach of agreement."²⁴

One has but to examine, however, the development of the common law to observe that in its early history classes of actions were of less importance than rigorous adherence to the formula of the class or form of action chosen. Procedure prior to the Statute of Westminster II had not developed, as yet, any real or scientific classification of actions. For example, there were separate writs of ael, besael, and cosinage, actions brought for exactly the same purpose, namely, to vindicate the plaintiff's right to lands, the sole difference, in fact, being that in one case the title to land depended upon the seisin of a grandfather, in another upon the seisin of a great-grandfather, and so on. It is the case of separate writs for trespasses of pigs and cattle, in a different form.

²¹ Y. B. 19 R. II, Fitzherbert, Accion sur le case, 51.

²² Y. B. 19 R. II, Fitzherbert, Accion sur le case, 52.

²³ Y. B. 45 Edw. III, fol. 17, pl. 6.

²⁴ Holmes, The Common Law, 275.

We may find many isolated instances of attempts to use one form of action as a melting-pot for a great number of miscellaneous and more or less related kinds of litigation. The action of novel disseisin, for example, might readily have been classified as a trespass, for it was established by the Assizes of Clarendon in 1166 as a remedy against trespasses of force, and Bereford, J., in the reign of Edward II, refers to a disseisin as a tort.²⁵ Yet it never fell within the scope of the general action of trespass. On the contrary, it preserved an autonomous existence until little more than a century ago, and assimilated to itself during that time many trespasses far removed from the wrongs which gave it birth.

The hard-and-fast line of cleavage that causes all actions to the modern legal mind to sound either in trespass or in assumpsit is a purely modern creation. Cases in the early history of the common law were largely instances. In the modern common law they are members of the one group or the other.

Aside from trespass, the Statute *in Consimili Casu* was of general benefit in conferring flexibility on many forms of action.

In 3d Edward II²⁶ the Statute *in Consimili Casu* was used to give a remedy to a plaintiff who was a tenant by the curtesy, whereas the existing remedy applied only to the case of alienation by one who held in dower. It was conceded that the common law did not warrant such a writ, but it was argued that the statute²⁷ provided that "in like case demanding like remedy, a writ be made." The writ was quashed, but afterward a writ was framed which ran as follows: "And which tenements should return to him by the form of the Statute provided for a similar case." In another case of the same year, 3d Edward II,²⁸ Bereford, C. J., said:

"'No writ is maintainable outside of the course of the common law, [and] by the 'form of the Statute' unless it be expressly given by the Statute. And as to what you say about 'let the clerks of the Chancery agree,' that is to be understood of the writs in strange cases; but if your writ had not those words 'by the form of the Statute,' it would have some color, and might be maintainable.'

"Afterwards, Stanton, Judge, looked at the statute and said: 'Will

²⁵ See George F. Deiser, *Some Ancient Reporters and an Ancient Action*, 48 Am. L. Reg. N. S. 1.

²⁶ 3 Selden Society Year Book Series, 107.

²⁷ Westminster II, c. 24.

²⁸ 3 Selden Society Year Book Series, 108.

you say anything else to maintain your writ?' Ingham. 'We have nothing to say but what we have said.' Stanton, Judge. 'So this Court awards that B. go quit of this writ, and that A. be in mercy for his false plaint.'"

Four days afterward the statute was considered in the presence of Bereford, C. J., and Bardelby and Osgodby, and other examiners of the Chancery, and they amended the writ by this clause: "In like case provided."

The form of writ which they adopted was as follows:

"[The King] to the Sheriff of Yorkshire, greeting. Command John de Stiveton and Amice his wife that justly etc. they render to John le Flemyng one messuage and three bovates of land with the appurtenances in Lofthouse next Harewood, which they claim to be their right and inheritance etc., and into which John and Amice have no entry, save after the demise which Robert le Flemyng, brother of [the demandant], whose heir he is, made to Hamo de Hauterive for the life of Hamo, and which, after a demise made thereof by Hamo to William Hamilton in fee, ought to revert to [the demandant] by the form of the Statute provided in a like case (*in casu consimili*) — so he says — and whereof he complains that the said etc. Witness, myself, at W[estminster] on the third day of May in the third year of our reign."²⁹

Practically the same form is employed in a writ of entry in 18th Edward III.³⁰

Almost the same decision was reached in the case of an action brought by a life tenant in 35th Edward I,³¹ and there it was contended that as the statute only provided a remedy in the case of dower, the Statute *in Consimili Casu* authorized the writ in this case as one needing a similar remedy.

The statute was applied for the purpose of giving a remedy by writ of entry *in consimili casu* in 14th Edward III,³² and in an action of trespass on the case in 31st Edward I.³³ Bereford says in answer to an objection to the writ:

"'When we find a good writ in accordance with his case, why should we deprive him of his good writ?'

²⁹ 3 Selden Society Year Book Series, 109.

³⁰ Y. B. Rolls Series, 17, 18 Edw. III, 441.

³¹ Y. B. Rolls Series, 33-35 Edw. I, 428.

³² Y. B. Rolls Series, 14 Edw. III, 116.

³³ Y. B. Roll Series, 31 Edw. I, 413.

"Mutford. 'Every writ must be sustained either by common law or by statute.'

"Bereford. 'This writ is maintainable by the law,' it having been argued that the words of the statute were 'Although such writ was not previously granted in the Chancery.'"

This is merely another instance of the use to which the statute was being put.

An action of trespass on the case appears in 15th Edward III³⁴ for neglect of a duty to maintain the walls or dykes about four perches of land, but this action was later discontinued.

The statute that gave rise to the action of trespass on the case was a piece of Aristotelian classification such as, "All houses are brick or not brick," which created at any rate a definite group for brick houses. As for the houses "not brick" they necessarily form a superlatively miscellaneous group. The same phenomenon is to be observed in the Statute in *Consimili Casu*. It really classified cases into cases of trespass and those not of trespass, or, if you like, of trespass on the case. The action of trespass thereby became definite. It was and remained the action which included those wrongs that were done "*contra pacem*." ³⁵

The writ contains these words, "*tali die ostendit quare vi et armis*," etc., and concludes, "*ad grave dampnum ipsius A. et contra pacem nostram*." ³⁶

And it is said, "This writ lyeth where ye Trespass is made or done to any man or woman, and supposeth that the Trespass is done with force and armes." ³⁷

On the other hand, the action of trespass on the case "*in rerum natura*," as the judges were so fond of remarking, became a receptacle of indefinite capacity into which every doubtful remedy, whether like trespass or not, was thrown. The only requisite was, apparently, that the writ must not assert that the basis of suit was done "*contra pacem*." Other actions on the case, it is true, were resorted to, but there were no debts on the case or covenants on the case, for when modifications of technical debts or technical covenants arose, they were sued out in an action on the case. In fact many of the cases are begun simply as actions on the case, with

³⁴ Y. B. Roll Series, 15 Edw. III, 87.

³⁶ *Natura Brevium*, f. 48.

³⁵ Y. B. M. 45 Edw. III, 17.

³⁷ *Natura Brevium*, f. 48.

no reference to trespass. The plaintiff brings an action on his case.³⁸

If the writer has clearly defined the situation, it must be obvious that the problem is not to discover how a promise ever became the basis of an action in tort. That in reality was not the case. The Statute of Westminster II was the means by which a remedy was given, not merely for trespasses, but for all those miscellaneous instances of litigation that did not fall into any well-defined category. In one case the action is made the basis of relief where a prior has been ousted practically from his franchise of taking toll. The court awards the plaintiff damages and decrees the restoration of the franchise,—an evidence in itself of the latitude which the statute afforded in providing a complete remedy.³⁹

The Statute of Westminster II was in a sense the first adventure of the common-law procedure in broad, general classification. If it were within the scope of this essay, we might trace the action of trespass on the case until assumpsit was given a separate existence, and trespass on the case became the remedy for enforcing the payment of damages for breach of duty. It is desired to make clear at this point only, that breach of a promise, agreement, or undertaking was regarded, even in the earliest cases, as at the most a very doubtful trespass; the agreements, contracts, undertakings, fell naturally and easily into the broad and flexible remedy afforded by the statute, and the development of assumpsit as a separate action was a matter only of time and the frequency of litigation over broken promises. When once this is understood, it is an easy matter to follow the subsequent development of assumpsit in Mr. Ames' *History of Assumpsit*.⁴⁰

We may obtain some further light upon the position of contracts prior to the statute by observing the manner in which the law dealt with miscellaneous instances of broken faith.

A century earlier, if we may believe Glanville, the common-law courts afforded no remedy in contract. He says:

"A debt sometimes arises from a letting out and a hiring, as when anyone lets out a thing to another for a certain period, in consideration of receiving a certain reward. In such case the former is bound to concede the use of the thing and the latter to pay the price. But it should be observed,

³⁸ Y. B. H. 11 R. II, Fitzherbert, *Accion sur le case*, 36.

³⁹ Y. B. M. 43 Edw. III, pl. 30.

⁴⁰ 2 HARV. L. REV. 1.

upon the expiration of the term stipulated, the former may lawfully and of his own authority resume possession of his property. But if the person engaging to hire the thing should not pay the price at the appointed time, it may be asked, whether the other party can in such case forcibly resume possession by his own authority?

"But we briefly pass over the foregoing contracts, arising as they do from the consent of private individuals, because, as it has already been observed, the King's Court does not usually take cognizance of them; nor indeed, with such contracts, as may be considered in the light of private Agreements, does the King's Court intermeddle."⁴¹

Let us say only, by way of comment, that this is in the reign of Henry II, when the common law, as such, is beginning; when writs, for the first time, are issuing from a King's Court, and in the very year, perhaps, when common-law reports first begin their appearance, for it is in 1189, the beginning of the reign of Richard I, that the plea rolls begin; and they have not ceased to appear since that time. So that, at the beginning of the common law, in a reported form, there is no action that enables one to recover for a breach of contract as such. Debt there is, and covenant, but nothing resembling the later action of *assumpsit*. The general jurisdiction of contract belonged to the Church, upon the theory that one who had made a promise and broken it thereby pledged his hope of salvation.

But it is not to be supposed that contracts made their appearance in the law only with the action of *assumpsit*. Even the Saxon law affords proof of this.

"A churl who has hired another's yoke, if he agrees to pay half in fodder, must do so. If he is not so bound, he must pay half in fodder, and half in other goods."⁴²

This is one sort of contractual relation, beyond question. A somewhat similar situation arises from a rental of land.

"If a man agree for a yard of land, or more, at a fixed rent and plough it, if the lord desire to raise the land to him to service and to rent, he need not take it upon him, if the lord do not give him a dwelling, and let him [the lord] lose the crop."⁴³

⁴¹ Beames, Glanville, Introduction by Professor Joseph H. Beale.

⁴² Laws of Ine, Thorpe, *Ancient Laws and Institutes*, 141, paragraph 60; Liebermann, *Gesetze der Angelsachsen*, 117, paragraph 60.

⁴³ Thorpe, *op. cit.*, 147, paragraph 67; Liebermann, *op. cit.*, 119, paragraph 67.

The same phenomenon is present here. The law is incapable as yet of assimilating into a single form of action all of those varied legal situations at the basis of which lies a promise or an undertaking. To the early law a promise to a farmer meant one suit; a promise to a grocer, possibly another; but an inflexible procedure had not yet made it difficult to provide a remedy for both cases.

Further illustration is afforded by the Saxon oaths. If a man found his property unsound after he had bought it, he took this oath:

"In the name of Almighty God, thou didst engage to me sound and clean that which thou soldest to me, and full security against after claim, on the witness of N. who then was with us two."⁴⁴

The oath of the vendor is as follows:

"In the name of Almighty God, I knew not, in the things about which thou suest, foulness or fraud or infirmity or blemish, up to that day's-tide that I sold it to thee; but it was both sound and clean, without any kind of fraud."⁴⁵

Instances of the kind might be multiplied from the Saxon law and from the law of a later period, but the instances given sufficiently illustrate the matter in hand. It is the belief of the writer that the history of the various forms of action can never be written intelligibly unless it is understood that forms of action are the result of an attempt to create a writ flexible enough to receive a large number of instances of litigation based upon causes more or less related. For example, the term "a wrong" is of so wide a scope, that almost anything might be considered as falling within such a classification. And yet, general as the term was, it became necessary at a very early date to distinguish between wrongs of violence, and those that consisted either of mere breaches of duty or of failure to perform an act that one was bound to perform. Seen in this light, it is just as much a wrong to fail in the performance of an agreement as to fail in the performance of any other duty.

It must be understood that in the ultimate analysis every lawsuit rests upon some such elementary principle as that which is now generally recognized as the basis of an action in trespass for negli-

⁴⁴ Thorpe, *op. cit.*, 181, paragraph 7; Liebermann, *op. cit.*, 399, paragraph 7.

⁴⁵ Thorpe, *op. cit.*, 183, paragraph 9; Liebermann, *op. cit.*, 399, paragraph 9.

gence. It is at the present time universally considered necessary for the plaintiff in an action based upon negligence to show that the defendant was under a duty toward him, that there was a breach of the duty, and that the breach of the duty resulted in damage to the plaintiff. But the causal relation between a duty and the failure to observe it is in the last analysis just as much a part of an action in assumpsit as of an action in tort. If our reasoning be clear, the development of the various forms of action beginning with the Statute of Westminster II may be traced and interpreted upon this principle. Let anyone who has the curiosity examine the list of writs which Mr. Holdsworth gives in his history of English Law, or the writs in the *Natura Brevium*. They are composed of duplicates without number. Some dozens of writs may be found in the Writ of Right Group, every one of which rests essentially on the same kind of facts. As a matter of fact, writs could not be said to have an arbitrary form much before the time of Edward I, owing to the lack of any organized system of reporting cases. In Glanville's time, of which his treatise gives proof, the writs were moulded to meet the facts, and such procedure as there was, and simple as it was, was extremely flexible. It is only after classification has begun and procedure has assumed a fixed arbitrary form that the difficulty was felt in finding a remedy into which the facts might fit. Apparently, so far as assumpsit was concerned, the Statute of Westminster II filled a long-felt want. The judges made little resistance to efforts to enforce an undertaking in an action on the case, and as the cases show, objection that there is a covenant, or an undertaking, never prevailed.

The distinction between the kinds of duties violated by a tort and by a breach of contract occupies very little space in the legal mind for some time after the Statute of Westminster II. We find in a case of Michaelmas Term, 3d Edward II,⁴⁶ that Herle makes this reply to Toubey:

"Am I to hold the covenant against all folk who may oust you where a recovery against them is secured to you by the law, and where you can assign no tort in my person?"

"Herle. 'The writ says that you are to be summoned to answer not for a tort, but for a breach of covenant; and to that you make no answer. Judgment against you as undefended.'"

⁴⁶ 2 Selden Society, Year Book Series, 87.

On the other hand, a breach of covenant is at times spoken of as a tort. For example, in Michaelmas Term, 3d Edward II,⁴⁷ the argument is as follows:

"Westcote. 'We say that you yourself leased the house, etc., and by your deed bound yourself to warrant and defend. That you have not done, and so we do affirm a tort in your person, namely, a breach of Covenant.'"

This is clear enough, that the precise difference in the nature of the wrong done between failure to observe a duty and failure to observe a contract was not in the year 1309 as yet well defined.

If we review our facts, we shall find that they assume somewhat this form. The Statute of Westminster II was designed to meet strange cases, another way of expressing "cases not provided for." Every action that did not furnish a remedy for a case where a plaintiff had palpably suffered wrong was stretched by adding the words "in like case provided." In the case of real actions this was not such a difficult matter. The law had never encountered much difficulty with cases ruled by a similar principle. Let us hark back for a moment to the Saxon law. The law said, if swine eat a man's acorns, let the owner pay. Later, cattle destroy a crop. The law adds a new provision, imposing a penalty where damage is done by cattle. Our beneficent statute makes the transition a bit simpler. The Statute of Gloucester gives a specific remedy to the doweress. A tenant by the curtesy presents his claim. Shall he be remediless when his wife might have had one? Not so. The statute says "in like case provided," and the tenant in curtesy had his writ. And when a life tenant made the same plea, the court still saw the analogy, and he too had his writ.

The actions on contracts, undertakings, agreements, followed the same development. It was possible to give a man a remedy where none had existed before. After the sting is taken out of a trespass by the elimination of direct force, and the substitution of a failure to act, or an omission to perform one's duty, the various sins of omission and commission shade into each other almost imperceptibly.

We shall be far from comprehending the development of the forms of action if we ascribe to the early Year-Book judges an Austinian power of analyzing fundamental legal conceptions, and employing

⁴⁷ 2 Selden Society, Year Book Series, 85.

them as the basis of scientific redress. Each new remedy, or each new case thrown into an old classification, was the creature of exigency, and the statute was welcomed as a means of averting hardship. This is made abundantly clear by the miscellaneous instances that we have given of the operation of the statute.

Returning now to the action on the case, it will be seen that the facts of the cases given present a great variety of breaches of duty. We have counsel arguing on the one hand that a tort is charged, namely, a breach of covenant; we have counsel arguing that it is no tort, but a breach of covenant. Again, the duties for breach of which an action on the case is sustained are equally diversified. An analogy could scarcely be more far-fetched than one which admits of an action in tort for refusal to observe a customary duty to sell three gallons of beer for seven pence; yet the judges had little difficulty in finding room for a remedy in the action on the case.

Failure to perform any kind of duty was a sufficient analogy for the judges to admit an action, provided no breach of the peace was set up. As we have already observed, a breach of a contract, covenant, or undertaking was as much a breach of duty as a failure to maintain a dyke or an enclosure.

The subsequent history of *assumpsit* has been written by Mr. Ames. The introduction of consideration as an element of relief in *assumpsit* is a matter of later development with which this essay does not attempt to deal. It has been our purpose to trace the development by which a remedy was gradually afforded for such breaches of duty as arose from contractual relations. To the writer it seems clear that little difficulty was encountered after the passage of the Statute of Westminster II, in finding whatever slight analogy was needed for affording a remedy for breaches of covenant or contract in the action on the case; and the existence of a remedy being conceded, the subsequent definition and development of its fundamental attributes was a matter only of time and the frequency of like cases.

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